Nos. 82-1331 and 82-1352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; BRIEF AMICUS CURIAE OF THE UTAH PUBLIC SERVICE COMMISSION IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI OF THE LOUISIANA PUBLIC SERVICE COMMISSION, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

BRENT H. CAMERON, *Chairman*
DAVID R. IRVINE, *Commissioner*
JAMES M. BYRNE, *Commissioner*
IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Utah Public Service Commission (hereinafter UPSC) respectfully moves for leave to file the attached brief *amicus curiae* in support of the request of the petitioners, Louisiana Public Service Commission (Case No. 82-1331) and National Association of Regulatory Commissioners, *et al.* (Case No. 1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the petitioners to the filing of a brief *amicus curiae* by UPSC has

been obtained. The consent of the respondents Federal Communications Commission and the United States of America to the filing of a brief *amicus curiae* by UPSC has also been obtained.

The interest of UPSC in this matter results from its role as a state regulator of utilities (Utah Code Ann., §54-4-1, 1981) and as the agency charged with engaging in formulation of public utility regulatory policy. (Utah Code Ann. §54-1-10, 1983.)

The impact of the decision of the United States Court of Appeals for the District of Columbia Circuit upholding the order of the Federal Communications Commission challenged by the petitioner removes from the states the ability to secure telephone service for state customers at reasonable rates. Therefore, the UPSC is a proper party to represent the interests of Utah's ratepayers who are not parties to this action, but whose interests will be directly affected by the final resolution of the issues in these cases.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE UTAH PUBLIC SERVICE COMMISSION

INTEREST OF THE UTAH PUBLIC SERVICE COMMISSION

The Utah Public Service Commission (UPSC) is an independent agency of the State of Utah charged with the responsibility to regulate public utilities (Utah Code Ann. § 54-4-1, 1981). The Commission engages in long-range planning regarding public utility regulatory policy, (Utah Code Ann. §54-1-10, 1983) and therefore is qualified to represent Utah's regulatory interests and telephone customers.

The *Second Computer Inquiry*[1] as decided by the Federal

[1] In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Docket No. 20828), 61 FCC 2d 103 (1976), 64 FCC 2d 771 (1977), 72 FCC 2d 358 (1979), 77 FCC 2d 384 (1980), 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981).

Communications Commission and then affirmed by the United States Court of Appeals for the District of Columbia Circuit, *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) drastically shifts the traditional structure and methods of regulation in the telecommunication area. This *Second Computer Inquiry* decision removes UPSC's statutory and historic responsibility to assure Utah customers of adequate service at reasonable rates. The decision would effect a fundamental shift of jurisdiction from the state to a federal agency, leaving customers without the protection of state regulation of intrastate service. By not allowing this Commission to regulate customer premises equipment, the FCC decision undermines the result intended by Congress in the 1934 Communications Act, 47 U.S.C. §§151 *et seq.* It radically alters implementation of congressional intent. Public service commissions across the nation consider the various individual and distinctly unique characteristics and problems of each state in formulating rate structures for the telecommunication areas. Because the FCC decision pre-empts state authority to regulate customer premises equipment the UPSC is extremely interested in the resolution of the filed petitions which contend that FCC pre-emption of state regulatory authority in this case is inconsistent with the clear intent of Congress and the FCC's own statutory authority.

SUMMARY OF ARGUMENTS

The petitioners, Louisiana Public Service Commission *et al*, have raised a federal question, resolution of which will substantially determine the manner in which the telecommunication industry is regulated, and whether such is in the manner which has been clearly and unmistakably mandated by Congress.

The potential ramifications of the decision from which

the appeal is taken are enormous, and raise issues which affect virtually every citizen. The impact of the decision, if upheld, may well seriously affect the opportunity of many thousands of customers, especially in sparsely populated areas, to have affordable access to telephone service. For decades this nation has been committed by congressional mandate to the concept of universal telephone service, and historic rate subsidies have made that objective generally attainable. The resultant patterns have evolved over several decades, and the abrupt departure from historic pricing policies by the FCC promises to destroy that national objective. Universal service is such an elemental component of national telecommunications policy that changes, outside of state regulatory purview, if they are to be made at all, should be made by the Congress and until the law is changed, that policy is the law of the land, irrespective of the wishes of a federal agency charged to uphold it. The FCC decision is a frontal assault upon the authority of Congress, and the Court should act to preserve the separation of powers which is in jeopardy.

The UPSC supports the position of the petitioners that the FCC does not possess the required legal authority to change established policy goals of the Communications Act and to pre-empt state regulation of customer premises equipment.

Congress clearly did not intend for pre-emption, nor did the FCC comply with the prerequisites required prior to pre-emption. There was no clear congressional mandate established to allow federal regulation to pre-empt state law.

The Communications Act of 1934 expressly reserved certain areas of the telecommunications industry to state regulatory control and nothing has occurred to modify this congressional directive.

For these reasons, UPSC respectfully urges this Honorable Court to grant the petitions for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and reaffirm the well-established principle that a federal agency may not pre-empt state regulatory authority in the absence of congressional permission that it do so.

ARGUMENTS

I. The FCC Pre-emption of State Ratemaking is Not Pursuant to Clear Congressional Authority.

Congress unquestionably has the power to pre-empt state law by various clauses of the United States Constitution such as the Commerce Clause (Art. I§8,cl.3) and the Supremacy Clause (Art.VI,cl.2). However, because of the general reservation of power by the states through the Tenth Amendment, Congress must have clearly intended to pre-empt state law before the Court allows such action. Therefore, a clear showing of this type of congressional mandate must be established before federal regulations are pre-emptive of state law:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits *no other conclusion or that Congress has unmistakably so ordained. Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)." (emphasis added)

Therefore, the FCC's pre-emptive action as a federal administrative agency is valid only if it satisfies the prerequisites for the exercise of pre-emptive power by Congress. Clearly, since administrative agencies receive their authority, from congressional statutes, the power to pre-empt

state law must be given to that agency by Congress. Also, the administrative agency must demonstrate conclusively that the agency action furthers objectives mandated by Congress. In other words, the agency must not act outside of its delegated authority or in a manner inconsistent to that which Congress intended. *State of North Carolina v. United States,* 325 U.S. 507, 655 S.Ct. 1260 (1945). This authority shows that pre-emptive intent must come from Congress and is not easily inferred. The 1934 Act does not provide for action to be taken as it was, and the FCC in the *Second Computer Inquiry, supra* clearly did not meet the standards required to permit pre-emption by the FCC over customer premises equipment.

II. Congressional Directives in the 1934 Communications Act Establishing State Ratemaking Authority, were ignored by the FCC.

The Federal Communication Commission by virtue of the 1934 Communications Act, 47 U.S.C.§§ 151 *et seq.* has authority to regulate rates for interstate telephone service. This authority from the Communication Act places with the FCC the responsibility to develop rules, regulations and accounting systems for interstate ratemaking only.

With clear and explicit language Congress established that authority for intrastate telephone service regulation was to be retained by the states.

> "nothing in this Act shall be construed to apply or give the FCC jurisdiction with respect to (1) charges, classification, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . ." 47 U.S.C. § 152 (b)

Limitation on the FCC's authority over intrastate service is further demonstrated in the Act by Congress's handling

of consolidations or merger of telephone companies. In Section 221 of the 1934 Communications Act; 47 U.S.C. §221, which deals with consolidations and mergers, Congress's intent to leave intrastate rate making to the states is unmistakably and expressly stated. Pursuant to 47 U.S.C. §221 subsection (a) the FCC is to grant the certifications for consolidation, control or merger, but this power is restricted and expressly preserves state jurisdiction:

> "Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of several states to control and regulate telephone companies" 47 U.S.C. §221 (a).

Additional language similar to § 152 (b) was incorporated in a separate subsection, 47 U.S.C. §221 (b) preserving state regulatory control over rates where metropolitan telephone exchanges straddle state borders. Thus, it appears from the language of 47 U.S.C. §152 (b), 47 U.S.C. §221 (a) and (b), that Congress clearly manifested a definite desire to protect state regulatory jurisdiction over intrastate rate-making from FCC encroachment.

The clear and unmistakable language of the Act has been conveniently overlooked by the FCC in interpreting its own authority and by its attempt to instigate a sweeping new policy. The determinations of terms and conditions of intrastate and local exchange service are state functions, have been reserved to the states by Congress and while the merits of the FCC's action may be arguable, they are issues reserved for state determination, no matter how utilitarian they may appear to the federal administrators.

CONCLUSION

If allowed to stand, the decision of the United States Court of Appeals for the District of Columbia Circuit

affirming FCC pre-emption of state regulatory authority over customer premises equipment — unsupported by congressional mandate and in express violation of the 1934 Communications Act — will profoundly compromise the states' role in the national telecommunications regulatory framework as established by Congress in that Act. Therefore, the Utah Public Service Commission respectfully requests that this Court issue the requested writ of certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully Submitted,

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